

Pages 1 - 38

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline S. Corley, Magistrate Judge

IN RE: FACEBOOK, INC. CONSUMER )  
PRIVACY USER PROFILE LITIGATION.) NO. 18-MD-02843 VC (JSC)  
\_\_\_\_\_ )

San Francisco, California  
Friday, September 25, 2020

**TRANSCRIPT OF ZOOM WEBINAR PROCEEDINGS**

**APPEARANCES:** (via Zoom)

For Plaintiffs:

KELLER ROHRBACK LLP  
1201 Third Avenue - Suite 3200  
Seattle, Washington 98101  
BY: **DEREK LOESER, ATTORNEY AT LAW**  
**CARI LAUFENBERG, ATTORNEY AT LAW**  
**DAVID J. KO, ATTORNEY AT LAW**

BY:  
BLEICHMAR, FONTI & AULD LLP  
555 12th Street - Suite 1600  
Oakland, California 94607  
BY: **LESLEY E. WEAVER, ATTORNEY AT LAW**  
**ANNE K. DAVIS, ATTORNEY AT LAW**  
**MATTHEW P. MONTGOMERY, ATTORNEY AT LAW**  
**ANGELICA M. ORNELAS, ATTORNEY AT LAW**

**(APPEARANCES CONTINUED ON THE FOLLOWING PAGE)**

Reported By: Marla F. Knox, RPR, CRR, RMR  
United States Official Court Reporter

**APPEARANCES:** (CONT'D)

For Defendant:

GIBSON, DUNN & CRUTCHER LLP  
1881 Page Mill Road  
Palo Alto, California 94304

BY: **MARTIE KUTSCHER CLARK, ATTORNEY AT LAW**

GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, California 90071

BY: **DEBORAH L. STEIN, ATTORNEY AT LAW**

GIBSON, DUNN & CRUTCHER LLP  
2100 McKinney Avenue - Suite 1100  
Dallas, Texas 75201

BY: **RUSSELL H. FALCONER, ATTORNEY AT LAW**

1 Friday - September 25, 2020

8:30 a.m.

2 **THE CLERK:** Court is now in session.

3 Calling civil action 18-MD-2843, In Re: Facebook, Inc.

4 Counsel starting with Plaintiffs, can you please state  
5 your appearance?

6 **MS. WEAVER:** Yes, I have been asked to be the  
7 spokesperson. And today we have Derek Loeser, Cari Laufenberg  
8 and David Ko from Keller Rohrback. And from my firm, Anne  
9 Davis, Matt Montgomery, Angelica Ornelas and myself, Leslie  
10 Weaver, from Bleichmar Fonti.

11 **THE COURT:** Good morning.

12 **MS. KUTSCHER CLARK:** Good morning. And for Defendants  
13 you have Deborah Stein, Russ Falconer and myself, Martie  
14 Kutscher Clark, at Gibson Dunn for Facebook.

15 **THE COURT:** All right. Good morning. All right.  
16 Thank you for your joint statement. Let's start sort of with  
17 the easier, the ADI. So I'm getting a stip today, Ms. Kutscher  
18 Clark?

19 **MS. STEIN:** I could speak to that actually,  
20 Your Honor.

21 **THE COURT:** Ms. Stein, okay.

22 **MS. STEIN:** Good morning, Your Honor. So our prior  
23 stipulation said that we would be prepared to stipulate today.  
24 We sent over a stipulation last night to Plaintiffs with our  
25 proposed timing.

1       The "prepared to stipulate" language in the prior  
2 stipulation was purposeful because we received the names of the  
3 six apps last week. So we have used the past week to come up  
4 with the number of documents to figure out how much time we are  
5 going to need.

6       So we are hopeful Plaintiffs will be okay with our  
7 proposed timing, which I'm happy to share with Your Honor; but  
8 I don't know if the stipulation will actually get filed today  
9 or next week.

10       **THE COURT:** Ms. Weaver, have you even had a chance to  
11 look at it and talk it over with your colleagues?

12       **MS. WEAVER:** Thank you, Your Honor. We have reviewed  
13 it. I think Mr. Ko wants to address this issue. Is that  
14 right?

15       **MR. KO:** Yeah. Hello, Your Honor. Yes, this is David  
16 Ko of Keller Rohrbach. So we did receive it late last night,  
17 and we actually haven't had a chance to thoroughly vet it. So  
18 we obviously want to take this afternoon and this morning to do  
19 so.

20       But our initial reaction -- and this is something that we  
21 alluded to in our statement -- that, you know, we understand  
22 that it's going to take some time for Facebook to review this  
23 material. But we also are cognizant of the fact that  
24 Your Honor kind of initiated this process in mid July.

25       And so, you know, there needs to be some sort of concrete

1 deadlines to this. And whether or not it is in this stip or  
2 some time soon, we do think that we need to set some clear  
3 deadlines about when we will have briefing to Your Honor.

4 **THE COURT:** No, no, no. I agree. I do want --  
5 deadlines are magical. So I do want deadlines. All right.  
6 Ms. Stein?

7 **MS. STEIN:** Yes, Your Honor. So the way we have the  
8 stipulation that we drafted framed is we've actually tried to  
9 keep the timing pretty tight with an estimated 30 days to  
10 finish collecting and reviewing the documents.

11 They are not even done -- we haven't started a review yet  
12 because we just got the names of the apps last week. So 30  
13 days to review the documents; 45 days to log them.

14 We are talking about thousands and thousands and thousands  
15 of documents, Your Honor. So 45 days is consistent with the  
16 privilege log protocol that the parties previously negotiated  
17 in a case. And that's the active protocol in the case.

18 So 45 days to log. That privilege log protocol has timing  
19 for privilege log challenges, for the meet-and-confer  
20 associated with it, and then a reference to then meeting and  
21 conferring about how to brief it and once the parties know what  
22 is being briefed.

23 So we are trying to keep things pretty fast, Your Honor.  
24 We just -- so we don't propose actual briefing deadlines  
25 because we don't know what the topics are to be briefed.

1           **THE COURT:** Well, it sounds like, though, we should  
2 plan on briefing it in January; right. We don't want anyone  
3 briefing it over the holidays, such as they are.

4           So let's really work on thinking -- at least get the  
5 briefing started in January.

6           **MS. STEIN:** I think that's probably where it would  
7 land, Your Honor. I think that it's probably a 30-day --  
8 depending on how the challenge process works, the protocol  
9 contemplates, I think, giving Plaintiffs 30 days to identify  
10 their challenges and then a meet-and-confer process concerning  
11 that.

12           So it may spill into February before there is briefing,  
13 but it can be faster if the Plaintiffs are faster -- do you  
14 understand the sort of --

15           **THE COURT:** Yeah, yeah, yeah. But I guess -- I mean,  
16 this is a little bit different in the sense that we sort of  
17 know already what the objections are.

18           I mean, the issue is there. It is just that I said I want  
19 to do it in context. I want some actual documents. I don't  
20 think the meet-and-confer should take that long.

21           I mean, I think they are expecting you to say "no." They  
22 will be pleasantly surprised if you say "yes." So I don't know  
23 that it will take the full 30 days.

24           **MS. STEIN:** It may not, Your Honor. I think the  
25 question is probably whether the challenges are to specific

1 documents or whether they are more categorical. So that's sort  
2 of where there is a bit of uncertainty.

3 **THE COURT:** Yeah. I mean, we are doing this whole  
4 exercise because there was sort of a categorical objection to  
5 production. And I wanted to have actually something in front  
6 of me so that it wasn't just a hypothetical ruling.

7 So, anyway, I would like you to at least set your sights  
8 on getting the briefing going in January.

9 **MS. STEIN:** Sounds good, Your Honor, thank you.

10 **THE COURT:** All right. Anything further, Mr. Ko?

11 **MR. KO:** No. That's fine, Your Honor.

12 **THE COURT:** Okay. All right. So now, let's go to the  
13 search terms. So this is what I'm going to do -- we just have  
14 to do something to bring this to an end. What I want to do --  
15 and this is just because it's the only way to make it even  
16 manageable for me -- by Monday at Noon I want Plaintiffs to  
17 identify -- let me ask you this: The proposal that Plaintiffs  
18 sent on, I think, September 19th -- is that the proposal that  
19 has been exchanged? Ms. Weaver --

20 **MS. WEAVER:** Yes, Your Honor.

21 **THE COURT:** -- are you speaking on this one? Okay.  
22 How many string searches were there?

23 **MS. WEAVER:** We count 195. Their initial proposal was  
24 13 line items. That was 78. And we are at about 195 right  
25 now.

1           **THE COURT:** Okay. All right. What I want you to do  
2 is by Noon on Monday identify your top 75. They are just all  
3 not equally important. Your top 75.

4           And then by Wednesday I want Facebook to prepare to  
5 respond. This is going to be the meet-and-confer. Be in  
6 writing. But it has to be in person, you know, video as well;  
7 and have your discussion, your meet and confer. That's the  
8 30th.

9           By the 2nd I want you to -- each to share your final  
10 positions. So I'm pushing it a little bit because otherwise  
11 I'm going to get something on the 2nd that is not useful. And  
12 then we are done with the meet and conferring, and you have all  
13 laid down your gauntlet. This is it. This is what I'm going  
14 to Judge Corley with.

15           By the 2nd, though, you would have shared everything you  
16 are going to share with me including if you are going to attach  
17 as an exhibit -- for example, the Plaintiffs if they are going  
18 to attach a document that has been produced that they are  
19 saying: This is why we need this search string because this is  
20 how it was used here -- you have to have shared that with  
21 Facebook.

22           Same thing. Facebook, if you are going to show me this  
23 is -- look, Judge, look at this ridiculous document that comes  
24 up with their search string. And we are going to get hundreds  
25 of these. You have to have shared it with the Plaintiffs.



1        Nothing can be argued to me or shared or attached that has  
2 not -- that's why I'm giving you more time. I'm giving you  
3 next week to really focus your arguments and share.

4        And then your submissions will be filed with me on that  
5 Wednesday the 7th. And this is what the submissions should  
6 address -- oh, and then the submissions itself -- while  
7 Plaintiffs would have given you your top 75 -- no more than 50  
8 strings. I'm not saying you are limited to 50 for the case.  
9 I'm just saying with this round, I want your top, right; your  
10 best; your most yield; what you need most.

11       And then we will deal with it later because, again, it's  
12 the only way to be manageable and for me to get my hands around  
13 this and to actually get this production going.

14       Facebook, you don't have to have 50. They would be  
15 thrilled if you had 50. You can have fewer. But whatever. No  
16 more than.

17       And then your submissions, I think the way to do it would  
18 be: Here is the request for production. And these are the  
19 strings.

20       Now, there may be strings that overlap that apply to more  
21 than one request for production. So organize it any way you  
22 want. But what I want to know is what documents in response to  
23 what requests are these strings searching for and also for the  
24 request for production -- to the extent you think it's  
25 important or there is a dispute -- what claim or defense will

1 these documents tend to prove. What custodians they are for.  
2 I know -- and it could be by group, however.

3 And, yeah, so -- and why these documents are needed or not  
4 needed. And so what gap -- for example, in this case unlike  
5 many cases you do have the -- have now had and reviewed what  
6 was produced to regulators.

7 And so what gap are these documents or these requests,  
8 string search, going to fill -- or what you saw that leads you  
9 to believe there is stuff there and from Facebook why they  
10 don't.

11 So do it that way.

12 **MS. WEAVER:** Your Honor, a point of clarification.  
13 These are the disputed terms; is that correct?

14 **THE COURT:** Yeah, yeah, exactly.

15 **MS. WEAVER:** Just wanted to make sure.

16 **THE COURT:** If you agree, I don't care.

17 **MS. WEAVER:** Okay. Good. Thank you.

18 **THE COURT:** Oh, and thank you for reminding me that  
19 there is some agreement.

20 (Laughter)

21 **MS. STEIN:** We were just going to put in all the ones  
22 that everyone agreed upon, Your Honor.

23 **MS. WEAVER:** Right. We feel like we are agreeing; but  
24 then these statements come out, and it really hurts our  
25 feelings, Deb.

1

2

3

4

6

8

10

11

13

14

16

17

20

25

1           **THE COURT:** So I have been -- I appreciate that,  
2 Ms. Weaver. I had been thinking more that -- no more than 50  
3 submitted to me, but then that -- that then sort of -- not that  
4 they would do this, but that gives Facebook an incentive not to  
5 agree. And I don't want to do -- I don't want to do that.

6                               (Pause in proceedings.)

7           **THE COURT:** Let's -- and I'm sorry if this is  
8 arbitrary. I'm just trying to help figure it out.

9           No more than 75 search strings, period, can be Plaintiffs'  
10 final demand. And then -- yeah. And then however many  
11 Facebook agrees to, they agree to.

12           I assume whatever is presented to me will be less than 50  
13 because they are going to agree to more than 25 and then --

14           **MS. WEAVER:** Okay.

15           **THE COURT:** That's what I'm thinking.

16           **MS. WEAVER:** Just another --

17           **THE COURT:** Sorry. Go ahead.

18           **MS. WEAVER:** So Facebook has proposed some terms to  
19 us, and we proposed some edits to them; but we didn't reject  
20 them. That's not in this pile. That is sort of what we would  
21 call "agreed" already. Because I would hate to unwind that.

22           **THE COURT:** Yeah, I don't want to unwind anything.

23           **MS. KUTSCHER CLARK:** Could I comment on that,  
24 Your Honor?

25           **THE COURT:** Of course.

1           **MS. KUTSCHER CLARK:** In the joint statement you saw an  
2 example of that where the revisions frequently take one of our  
3 terms and multiply it by three or four times to be  
4 significantly larger and significantly broader.

5           So in our view many of those revisions really are terms  
6 that are in dispute at this point.

7           **THE COURT:** This is -- okay. This is what I'm going  
8 to do: I don't want no more than 50 strings can be presented  
9 to me in dispute. That's all. I'm going to put that limit  
10 there.

11           **MR. LOESER:** Now I want to make sure I understand.

12           So there is a population of agreed terms. It sounds like  
13 there might be some disagreement as to what is agreed. So the  
14 first thing we have to do with Facebook is figure out what is  
15 that population of agreed terms. We will devote ourselves,  
16 hopefully today, to sorting that out.

17           Then there is the population of terms that is disputed.  
18 And we are going to have a meet-and-confer with Facebook. We  
19 will identify -- is it 75 terms that we still want -- and then  
20 from that, the parties will then ultimately --

21           **THE COURT:** We are talking about strings. I'm trying  
22 to figure out --

23           **MR. LOESER:** Strings.

24           **THE COURT:** -- the proposal on September 19th, did  
25 that include strings that have already been agreed to or was

1 that in addition to?

2 **MS. DAVIS:** Your Honor, Anne Davis. I can speak to  
3 that.

4 So our proposal on the 19th included, you know, a set of  
5 proposed revisions to Facebook's terms which included revisions  
6 to RFP coverage, custodians and the terms themselves.

7 There is a small subgroup of terms, generally very simple  
8 terms, where the parties are in agreement. And then there is  
9 the set of additional terms that Plaintiffs have proposed  
10 because we believe, you know, they are filling gaps in  
11 Facebook's base proposal.

12 So, you know, I think from our perspective, the set of  
13 terms where we have proposed revisions is a distinct group that  
14 I think we can, you know, decide to handle fairly quickly.

15 And then, you know, Plaintiffs have this additional set of  
16 terms that, you know, are -- you know, we think gap filling and  
17 I think we need your guidance in terms of do you mean 75 terms  
18 from that set or, you know, 75 terms including revisions to  
19 Facebook's proposal?

20 **THE COURT:** The latter.

21 **MS. DAVIS:** Okay.

22 **THE COURT:** The latter; right. And I'm talking about  
23 search strings, I guess, not terms, right, because terms would  
24 be --

25 **MS. DAVIS:** Yes.

1           **THE COURT:** -- you would be out -- you would meet your  
2 quota with just two strings.

3           **MS. KUTSCHER CLARK:** We would be happy to have 75  
4 strings.

5           **THE COURT:** No, no, no.

6           **MR. LOESER:** Let me ask you one more process question,  
7 Your Honor, because I think you are sensitive to Facebook -- an  
8 issue of we want to be able to avoid being able to game this  
9 process.

10           Now that there is this process, we could take a look at  
11 the terms where we have proposed revisions to their terms; and  
12 we could remove -- we will have to go through and look. We  
13 could see if there is additional terms that would just move to  
14 the agreed list so that we don't consume the entirety of our  
15 numbers on bickering over terms that all we were trying to do  
16 is modify them to make them better.

17           **MS. STEIN:** Strings --

18           **THE COURT:** I'm not -- so if it's custodian -- I'm  
19 not -- you don't have to -- if it is a dispute over which RFPs  
20 it covers or custodians, that I'm not talking about.

21           What I'm talking about is really the scope of the search  
22 string. So, you know, additional terms and those kinds of  
23 things within the search string, not custodian, you know,  
24 disputes or things like that. I think. I don't know. I'm  
25 open to --

1           **MS. WEAVER:** See, Your Honor --

2           **THE COURT:** Yes.

3           **MS. WEAVER:** If we set the disputed terms aside -- the  
4 ones where they proposed and we have made counter revisions --  
5 if we could set those aside -- I don't want to -- we could  
6 reach agreement on those possibly. There is at least a kernel  
7 of something -- and really just focus on the new terms that we  
8 had proposed that they had blanketly said no to, then we could  
9 at least get through those.

10          **THE COURT:** Well, let me --

11          **MS. WEAVER:** Yeah.

12          **THE COURT:** In the statement they give examples  
13 what -- on page 6 of the joint statement. Like to me that is a  
14 big dispute that I'm going to have to decide if you can't come  
15 to an agreement.

16          So I want you to identify whether they are new, whether  
17 they are revisions, whatever -- it doesn't matter -- your top  
18 75.

19          **MS. WEAVER:** Seventy-five then should we -- should be  
20 the number, Your Honor? Because otherwise we are -- we are  
21 unwinding some of the work that we have done. We are afraid  
22 that the incentives aren't cutting the right way.

23          **THE COURT:** So you have already agreed to 75 search  
24 terms?

25          **MS. WEAVER:** No, no. We are negotiating. And what



1 will happen now is we won't reach agreement on anything so that  
2 there is a bigger pool that we have to choose from.

3 So we would like a little more latitude, Your Honor. We  
4 won't want to put more work on Your Honor's shoulders, but this  
5 ruling could --

6 **THE COURT:** Well, what do you propose? I'm not  
7 saying -- it is not forever. And Facebook, given their  
8 position, can't complain later on that they have to go back and  
9 do search again if it turns out something really relevant was  
10 cut off.

11 **MR. LOESER:** Yeah, Your Honor, this is what I was  
12 trying to get at and I was being not very articulate about it.

13 There is a population of terms that they propose that we  
14 have offered revisions to. It would be nice if for this  
15 process of determining the 75, we could go back; look at that  
16 and eliminate dispute as to many of them as we can because we  
17 could live with some of what we have done. So that we don't  
18 end up using all of our 75 on terms of which there is kind of a  
19 base agreement as to those terms. It is just that we proposed  
20 some revisions.

21 So since we are resetting this process, I think what we  
22 would like to be able to do is say: Okay, really what we are  
23 trying to do here is not undo the work where there is agreement  
24 or close to agreement, but find a path forward for dealing with  
25 the disputed terms.

1           So we would like to be able to take a look at the  
2 proposals we made to revise their proposal, and we will  
3 eliminate from dispute as many of those as we can by accepting  
4 their strings.

5           That will then remove the incentive that exists otherwise  
6 for Facebook to disagree with everything and for us to have to  
7 sort of bid against ourselves on getting to 75.

8           So we will take that -- the population of terms where they  
9 made a proposal and we made a revision -- we will take another  
10 look at those, and we will try to eliminate every dispute we  
11 can and accept as many terms as we can.

12           **THE COURT:** Okay.

13           **MR. LOESER:** That shouldn't count against the 75. If  
14 it does, it just creates incentives in the wrong direction.

15           Then we will go to the really disputed terms. Work on the  
16 75. And all the process you described would apply to that. I  
17 think that would be a more effective way of getting to where  
18 you want to go without undoing work that has been done already.

19           **THE COURT:** Okay. So you want to start with their --  
20 you are going to go back and look at your revisions to their  
21 last proposal?

22           **MR. LOESER:** Right. So that we can eliminate, to the  
23 extent possible, any disputes. There will still be disputes.  
24 There will be some of those we need to revise because they were  
25 inadequate and they can't be fixed.

1           **THE COURT:** Yes.

2           **MR. LOESER:** There will be some now that you have hit  
3 us over a head with the hammer --

4                               (Laughter)

5           **MR. LOESER:** -- we will come around to accept it.

6           **THE COURT:** That's exactly what I wanted to do. You  
7 know, it is just like time limits in trial. It makes you just  
8 really figure out what is the most important.

9           That's fine. When do you think you could do that by?

10          **MR. LOESER:** I think we should try to do it, frankly,  
11 today and just --

12          **MS. WEAVER:** I don't know if we can do it.

13          **MR. LOESER:** I use the "we" very broadly on that one.

14          **THE COURT:** Yeah. If it is not Mr. Loeser, it is  
15 somebody else.

16          **MS. DAVIS:** To that end, I think we can fairly quickly  
17 go through and -- you know, Facebook's terms. And certainly I  
18 think by Noon on Monday we could, you know, identify our 75  
19 additional terms, you know, or those terms where we feel that  
20 the revisions to Facebook's terms are incredibly important or  
21 simply, you know, decide on which terms we can accept  
22 Facebook's most recent proposal.

23          **MR. LOESER:** Again, I think to be clear on the  
24 process, what would happen on Monday -- and Ms. Davis can  
25 correct me if I'm running off the rails -- the first thing we

1 will do is look at the revisions that we offered to Facebook's  
2 terms, and we will try to remove from dispute as many as we  
3 can. That's A.

4 B, we will choose our 75 strings that will then become the  
5 subject of the ongoing meet-and-confers.

6 **THE COURT:** Okay. So by Noon Monday you would have  
7 done both those things or just by Noon Monday you will advise  
8 Facebook of which ones you have sort of --

9 **MS. WEAVER:** I think we might need a little bit more  
10 time. So by Noon Monday we identify the disputed. Maybe by  
11 Wednesday we pick our 75.

12 **THE COURT:** No, no, no. By Noon Monday you identify  
13 the undisputed.

14 **MS. WEAVER:** Undisputed, right.

15 **MS. DAVIS:** We will accept Facebook's revisions --

16 **MR. LOESER:** And, right, by --

17 **MS. DAVIS:** -- from their last proposal, which we  
18 received on September 11.

19 **MR. LOESER:** Then, perhaps, by Wednesday -- now we are  
20 all just thinking out loud --

21 **MS. WEAVER:** Does that work, Anne, by Wednesday, can  
22 we pick our winners, 75?

23 **MS. DAVIS:** Yes.

24 **MS. KUTSCHER CLARK:** Your Honor --

25 **MR. LOESER:** We are on teams, Your Honor.

1           **MS. KUTSCHER CLARK:** If that's going to be the  
2 process, which is fine, I just want to flag, it is quite time  
3 consuming for us to run hit counts on all of these terms.

4           **THE COURT:** Yes.

5           **MS. KUTSCHER CLARK:** Which tend to be very important  
6 for the negotiation. So if we are not getting the proposal  
7 until Wednesday --

8           **THE COURT:** Yeah, we got to spread it out. Yeah, we  
9 got to spread it out.

10          **MS. KUTSCHER CLARK:** Yeah, I would guess we could  
11 realistically have the hit counts done by the following Monday,  
12 but I don't know that we could have them by Friday.

13          **THE COURT:** Okay. Well, you know what the experience  
14 has been; and you have been sharing those hit counts. I can  
15 tell. So that's good.

16          **MR. LOESER:** And, Your Honor, I will just second that  
17 the hit counts are very important. And if we need to add a few  
18 days to this process to get them, we fully endorse that.

19          **THE COURT:** Yeah, me too. I just want to have  
20 something that is as pithy and on point as we can get.

21          All right. So then that would be by -- so by Wednesday  
22 you will provide -- by Monday at Noon you will say: Okay,  
23 Judge Corley made us bid us against ourselves. We are  
24 accepting these revisions.

25          By Wednesday you will identify your top 75 of what is left

1 in dispute.

2 And then by Monday, the 5th, is when you will be able to  
3 share the hit counts and be able to meet and confer robustly.

4 And then -- and then what day -- should I give you the  
5 week -- and so by Friday will be where each side has to have --  
6 present their sort of final position and have shared every  
7 piece of paper that they may present to me?

8 **MR. LOESER:** As long as that's Halloween.

9 **MS. KUTSCHER CLARK:** So that's just --

10 **MS. WEAVER:** It is a little early.

11 **THE COURT:** There is no Halloween this year.

12 **MS. KUTSCHER CLARK:** Friday, the 9th, would be the day  
13 to exchange with each other those final submissions?

14 **THE COURT:** Yeah, exactly. And so by the 9th --

15 **MS. KUTSCHER CLARK:** Okay.

16 **THE COURT:** I mean, I anticipate the meet-and-confer  
17 should be going on that week; right. You will have hit counts  
18 on Monday. You will be going back and forth eating your  
19 cookies; sharing, whatever. And then by Friday, though, that's  
20 where -- that's it.

21 It is our final position. We have now showed you,  
22 Plaintiffs, all these are relevant documents. Plaintiffs, we  
23 have now showed you these hot docs that you are going to be  
24 missing.

25 And then you will submit to me your -- with whatever is

1 left. And maybe hopefully there won't be that much left in  
2 dispute by the following Wednesday. Is that enough time?

3 **MS. WEAVER:** Yes, Your Honor.

4 **MR. KO:** Your Honor, as long as we are speaking out  
5 loud about ideas, in terms of hit reports being due on Monday,  
6 October 5th, totally understand that it takes some time. But  
7 that would mean that we have to finalize our list and our final  
8 ask in five days or less, right, today and then next Wednesday.  
9 And then they would have just five days to turn around a hit  
10 report.

11 I think we could -- if we are going to set this schedule  
12 and push things back, I would ask -- and I think folks on my  
13 side would agree -- that what we identify as being our top 75  
14 be pushed back a little later next week, possibly Thursday or  
15 Friday. Because I think the hit report usually -- Martie, you  
16 can correct me if I'm wrong -- takes 24 to 48 hours to turn  
17 around.

18 **MS. KUTSCHER CLARK:** No, no. It takes many more days  
19 than that.

20 **THE COURT:** No, no, no. The thing is, Mr. Ko, I think  
21 you should know your top 75 as we sit here today; right? You  
22 have been living with these things. I mean, right. But you  
23 would have until next Wednesday. Like what is it? You should  
24 know what you are getting at and what is important.

25 You are not getting a hit report from them to do that;

1 right? You are doing it based on what you know now.

2 **MR. LOESER:** But the hit reports allow us to adjust,  
3 modify, abandon, whatever the terms. If we have a string that  
4 doesn't produce any hits, then we don't need that string. If  
5 we have a string that produces 9 million hits, then we are  
6 going to want to do something about it.

7 **MS. KUTSCHER CLARK:** Well, you already have the hit  
8 counts from the last round; and you are working off of what had  
9 been proposed on the last round. So you should already know if  
10 something hits on nothing or 9 million.

11 **THE COURT:** Right. The 195 or so that you proposed on  
12 the 19th, that was based on response --

13 **MS. WEAVER:** Yes.

14 **THE COURT:** -- to something you had already gotten;  
15 right. So, no --

16 **MS. WEAVER:** I do think, Your Honor, if we could have  
17 the date -- I received a text -- if we could have until  
18 October 16th instead of October 14th to brief Your Honor.

19 **THE COURT:** That's fine, yeah.

20 **MS. WEAVER:** Okay.

21 **THE COURT:** I mean, I think I told you guys before  
22 whatever you came up with, but you weren't able to come up with  
23 something. But that's fine.

24 **MS. STEIN:** Your Honor, so I have one more sort of --  
25 I'm sure -- I'm sure this is going to lead to more questions



1 but -- so everyone has been talking about Facebook's incentives  
2 to disagree.

3 I think it would be important to have a cap here on the  
4 total number of agreed and disagreed strings that we are  
5 dealing with because what ends up happening is there are  
6 incentives on both sides, Your Honor, frankly.

7 And so Plaintiffs, if there is no total cap, will just  
8 agree to as many of ours as possible and then move the  
9 duplicative ones into other strings so that then there is still  
10 a massive number of strings that we are dealing with.

11 **THE COURT:** No, no, no. So my original thing of no  
12 more than 50 strings could be submitted to me I think still  
13 applies. Mr. Loeser's proposal was that if they are going to  
14 agree to some now, we are taking that out. So it is not  
15 included within that 75.

16 **MS. STEIN:** Okay.

17 **THE COURT:** That 50 cap of what is presented to me is  
18 still there. That is just a, you know, manageability --

19 **MS. STEIN:** Thank you, Your Honor.

20 **THE COURT:** Not for -- not necessarily forever.

21 **MS. STEIN:** I understand, Your Honor. And then in  
22 the -- what we can expect from Plaintiffs in terms of the gap  
23 fillers, that will be also one string against another.

24 So to explain: If we have, say, you know, good news, we  
25 have 50 agreed strings. And there is still another 75 that

1 Plaintiffs want, it is their obligation to show why the 50  
2 agreed ones have gaps as it relates to the other additional  
3 strings that they want.

4 **THE COURT:** Well, I don't know they necessarily need  
5 to -- I mean, however they want to explain it as to why they  
6 need them; what RFPs they are responsive to. And then you can  
7 respond and say: No, that is duplicative. You are already  
8 going to get this. But, yeah, I don't --

9 **MS. STEIN:** Thank you, Your Honor.

10 **MS. WEAVER:** I would just say that we don't really  
11 have an incentive to create more strings that are going to pull  
12 documents that are irrelevant. I don't like paying people to  
13 review irrelevant documents.

14 **THE COURT:** That is true.

15 **MR. LOESER:** And if I can push back a little bit on  
16 what Ms. Stein just said, I think if we cap at 50 -- and that  
17 cap agrees both agreed terms and terms that aren't --

18 **THE COURT:** No, no, it doesn't. It's -- 50 is what is  
19 presented to me as disputed. That's the cap. No, no, no. The  
20 agreed terms are -- we have pulled them.

21 **MR. LOESER:** Okay.

22 **THE COURT:** They are not in your 75, and they are not  
23 in the 50.

24 **MR. LOESER:** Okay.

25 **MS. STEIN:** Ms. Weaver should be happy to --

1           **MR. LOESER:** I think we all understand.

2           **MS. STEIN:** -- to know that we won't produce  
3 irrelevant documents, but it's our team who will have to be the  
4 ones reviewing the irrelevant documents.

5           **THE COURT:** Yes.

6           **MS. WEAVER:** Yes, fair enough. Point taken.

7           **MR. KO:** I'm a little slow this morning. I'm just  
8 asking one more thing about the hit reports. I'm just playing  
9 a little catch-up. Can I ask one more question of  
10 clarification?

11           And Martie reminded us that the hit reports we already  
12 have. So if we are identifying terms -- 75 terms, for example,  
13 on Wednesday that we want -- and we already know what the hit  
14 reports are -- then what is the purpose of the five days that  
15 they have to turn around a hit report because we already have  
16 that information?

17           **MS. KUTSCHER CLARK:** I think we would need to rerun  
18 them because one of the important data points is whether things  
19 hit on unique -- unique documents or whether they are covered  
20 by other searches. And to get the total de-duped number, we  
21 would need to rerun everything with just the searches that you  
22 are proposing.

23           **THE COURT:** I don't think they have run hit reports on  
24 your proposal of September 19th.

25           **MR. KO:** They have.

1           **THE COURT:** Oh, they have.

2           **MS. KUTSCHER CLARK:** We have.

3           **THE COURT:** Oh, maybe that is -- they already have it.  
4       So they are just identifying from that. So I think that's  
5       right. They don't need to wait for the hit reports.

6           **MR. KO:** Right.

7           **THE COURT:** Because you have already done them.

8           **MR. KO:** That's why I was just saying -- just to take  
9       a step back, if we have five days -- you know, we have two  
10      deadlines to limit our terms. And then we turn around and wait  
11      five days for them to produce hit reports that we already have,  
12      I just --

13          **THE COURT:** Right, right, right. I get what you are  
14      saying. By Monday, instead of giving them hit reports, why  
15      can't you respond to their top 75 because you already have the  
16      hit reports for those.

17          **MR. KO:** I think that would be a good --

18          **MS. KUTSCHER CLARK:** I don't think that's right  
19      actually because what we need to be able to see is the total  
20      number of de-duped documents. And right now we have a total  
21      number for all of the search strings in the September 19th  
22      proposal.

23                But once that gets culled down to a smaller universe, the  
24      whole thing needs to get rerun so that we can see the total  
25      number, and we can see where the unique hits are going to be.

1 So it really does need to be rerun.

2 **MR. LOESER:** So those hit report numbers you are  
3 saying are inflated because they aren't de-duped?

4 **MS. KUTSCHER CLARK:** No.

5 (Laughter)

6 **MS. KUTSCHER CLARK:** No. They are based on what you  
7 proposed on the 19th. But once we -- once you narrow it --  
8 like, hypothetically speaking, if one -- if some of your search  
9 strings are totally duplicative of each other, it is possible  
10 that you could remove some search strings but the de-duped hits  
11 would look similar or there could be a different universe where  
12 you remove a search string that hit on a very large number of  
13 unique documents. So it does have a big effect on the total.

14 So we do need to rerun once we call this to a different  
15 set of searches so we are able to see how it affects the  
16 numbers.

17 **MS. WEAVER:** I would say this: I don't think we  
18 completely agree -- and I'm probably going to get yelled at by  
19 my team -- we concede. You can have that time.

20 **THE COURT:** You are not going to get yelled at. As I  
21 often tell newer lawyers, to concede is one of the most  
22 powerful things you can do as a litigator in front of a judge,  
23 quite honestly.

24 **MS. WEAVER:** I concede, Your Honor.

25 **MR. LOESER:** In California. As an out-of-state

1 lawyer, I'm often asked by judges if I submit. And I have  
2 always found that to be extremely disturbing. When you were  
3 fighting, submitting was the last thing you wanted to do.

4 **THE COURT:** So this is what I want you to do is next  
5 week or -- so by next week we are identifying. And then the  
6 following week you are just going to be meeting and conferring.  
7 And still we are coming up on -- I think we said the 9th;  
8 right? That's the final day, your final and best offer and you  
9 have shared all your evidence.

10 And then we are submitting by -- to me by the 16th. I  
11 want to give you limitations on the submissions and a page per  
12 string.

13 **MR. LOESER:** Does that include the string?

14 (Laughter)

15 **THE COURT:** Yes, yes. Yes.

16 **MS. STEIN:** To incentivize us to keep the string  
17 short.

18 **THE COURT:** Exactly.

19 **MR. LOESER:** Do you have a font size recommendation  
20 for that page?

21 **THE COURT:** Whatever is in the local rule. I think it  
22 can be no smaller than 12, but it can be single spaced.

23 And I'm trying to figure out how we do that. So a page  
24 per string -- so --

25 **MS. WEAVER:** Your Honor --

1           **THE COURT:** A way to figure this out because they are  
2 going to have a competing proposal to your proposal. What do  
3 you think?

4           **MS. WEAVER:** We have prepared these nifty charts,  
5 Your Honor, that both sides have become very facile with that  
6 have sort of a history of the proposals, the reasons.

7           And what we could do is -- you know, they actually have  
8 the whole history, the initial search term. Its Excel heaven,  
9 Your Honor. And what we can do is do some form with that and  
10 cut that down and submit probably a joint submission that just  
11 at least just identifies the string; what Facebook's  
12 counterproposal is. And in a sound byte could give a reason in  
13 the chart. And then if we could have a page of pros to  
14 explain --

15           **THE COURT:** That's all I want to say is each side gets  
16 no more than a page of narrative.

17           **MS. WEAVER:** Okay. We can do that.

18           **MR. LOESER:** That's more fair to the long strings,  
19 Your Honor.

20           **THE COURT:** What?

21           **MR. LOESER:** That's more fair to the long strings.

22           **MS. STEIN:** I must confess. I'm now thoroughly  
23 confused.

24           **THE COURT:** Well, I mean, there will be some where  
25 Facebook doesn't have a counterproposal; right. They are going

1 to say that string is not necessary at all. Maybe not. Maybe  
2 not.

3 But in either case, each side gets a page of narrative to  
4 explain their position. That includes all those things I want  
5 to -- you know, mostly I need in the end, you know, what claim  
6 or defense is it relevant to and why is it proportional.

7 **MS. STEIN:** So one page per search string, Your Honor,  
8 was that --

9 **THE COURT:** Yes, per disputed search string.

10 **MS. DAVIS:** Of description.

11 **THE COURT:** Of narrative, right, right, of narrative.

12 **MS. DAVIS:** Narrative.

13 **MS. STEIN:** I wasn't sure if I understood whether  
14 Your Honor -- this Excel spreadsheet is, I really don't think,  
15 anything anyone would ever want to see.

16 **MR. FALCONER:** It is not user friendly.

17 **MR. LOESER:** I will show it to you right now.

18 **MS. STEIN:** I don't like opening it up in the morning,  
19 Your Honor. I'm not sure if that is something you would  
20 really -- I think we all have an interest in presenting this to  
21 you and --

22 **THE COURT:** Yeah, just present it to me.

23 **MS. WEAVER:** I think we can narrow it down. I'm  
24 proposing that we eliminate the history and just leave our  
25 disputed terms and then, you know, a short -- so, like, a



1 four-column Excel spreadsheet.

2 **THE COURT:** That is a good point. I actually don't  
3 care about the history. It is not going to be who is more  
4 reasonable than this. I just want to know what your final  
5 positions were on the 9th and why I should, you know, pick one  
6 side or the other's position by the 16th.

7 **MS. DAVIS:** Your Honor, I hesitate to add more  
8 complexity to the hit report. But we do have a difference in  
9 terms of the custodians. We propose to run these terms across.

10 And it would be tremendously helpful, you know, to have  
11 that comparison for the different custodian groupings and that  
12 granular data for the custodians themselves so that we can  
13 actually take a look and prepare the proposals. And, you know,  
14 informed by that, remove custodians or otherwise, you know,  
15 make those compromises.

16 So, you know, I think we had hoped when Facebook is  
17 running these reports, we would like to receive that  
18 comparative data.

19 **MS. KUTSCHER CLARK:** We can do that. Again, it is  
20 just another thing that takes a little more time. And the only  
21 reason we didn't do it on the last round was there simply  
22 wasn't enough time to do it.

23 So we will endeavor to do our best. Our vendor has been  
24 working through the night every day running hit reports. They  
25 are e-mailing me at 3:00 o'clock in the morning frequently

1 about this.

2 **THE COURT:** Hopefully you are not reading their  
3 e-mails at 3:00 o'clock in the morning on that.

4 **MS. KUTSCHER CLARK:** Well, I won't comment on that.  
5 We are going to get as many data points as we possibly  
6 can. I just can't promise something that I don't know if we  
7 have bandwidth to achieve.

8 **MS. WEAVER:** The reason that that is important,  
9 Your Honor, is that it actually affects hit counts and opening  
10 of documents --

11 **THE COURT:** Of course.

12 **MS. WEAVER:** So if they are complaining that it's too  
13 large but we are in agreement of which custodians it will --  
14 but I'm sure that we can explain that in our narratives.

15 **THE COURT:** Yeah, yeah, yeah. That should be part of  
16 the meet-and-confer; right. Here, this -- for this particular  
17 person, it hit, you know, how many irrelevant documents. Let's  
18 just eliminate this custodian. It is just not enough yield  
19 there -- potential yield there. And that will save a lot.  
20 Something like that. That should be part of your  
21 back-and-forth, I guess.

22 Okay. All right. So we have that. That's going to take  
23 a lot of time, and we are just going to get this done.

24 **MS. KUTSCHER CLARK:** Your Honor, I'm sorry. Could I  
25 ask one more clarifying question?

1       So now that we are talking about the custodians, we spent  
2 two hours yesterday -- all of us who are here -- talking  
3 through the custodian groupings for these terms. And it took a  
4 very long time and was very complicated.

5       Are we considering the disputes about which custodians  
6 these terms should be run against to be part of the disputes we  
7 are teeing up for the Court on the 16th?

8       **THE COURT:** Well, it is not part of the 50. That is  
9 just the search strings. But it does seem to me it is sort of  
10 completely intertwined; right?

11       **MS. KUTSCHER CLARK:** Yeah.

12       **THE COURT:** If we are talking about burden, then that  
13 has to be included in there.

14       **MS. KUTSCHER CLARK:** Yeah. Okay. Okay. I'm just  
15 flagging that because it is another layer of complexity when we  
16 are talking about how we are briefing this and the hit counts  
17 and all of that going back and forth on which custodians  
18 everyone of these searches will be run against is a very  
19 complicated aspect of this process.

20       **THE COURT:** Can't get more complicated I think. I  
21 don't know. I mean, I'm not there with you. I don't know. I  
22 don't want to make things more difficult. I'm just trying to  
23 provide some deadlines or structure maybe that will help kind  
24 of finally bring this to an end.

25       **MR. LOESER:** That seems pretty important.

1           **MS. WEAVER:** So are we going to get the unique hits  
2 across the whole collection -- because that seems to be  
3 relevant -- on the 9th? The total number of responsive unique  
4 documents.

5           **MS. KUTSCHER CLARK:** Well --

6           **MS. WEAVER:** The date that you are providing the hit  
7 reports, are you going to be providing a hit count across the  
8 entire collection?

9           **MS. KUTSCHER CLARK:** We are providing the hit counts  
10 on the custodians for whom the terms have been proposed.

11           **MS. WEAVER:** But I thought the whole point -- sorry --  
12 I thought the point that you needed to rerun was to focus on  
13 this specific set so that we can say this is the total impact  
14 of these proposed terms.

15           So can we get a hit, a unique hit count across the  
16 collection? Meaning so that you are de-duping between  
17 custodians.

18           **MS. KUTSCHER CLARK:** I just don't -- I'm sorry. I'm  
19 honestly just confused. When you say "across the whole  
20 collection," what do you mean?

21           **MS. WEAVER:** I mean the 75 that you are going to run  
22 hit counts for.

23           **MS. KUTSCHER CLARK:** Yes, yes. I'm sorry. I thought  
24 you meant something a little different.

25           **MS. WEAVER:** Okay.

1           **MS. KUTSCHER CLARK:** We always provide that.

2           **MS. DAVIS:** Your Honor, I think a little of the  
3 complexity here is, you know, unlike in a typical case where we  
4 would propose a set of search terms that would run across the  
5 custodian population and be able to truly evaluate duplication  
6 here, because there is so many, you know, different custodian  
7 groupings, it is very actually, you know, difficult to say that  
8 because one term covers one set, another term for different  
9 custodians isn't going to -- you know, is actually going to be  
10 duplicative.

11           So I think that's part of what Ms. Weaver is trying to  
12 address in the -- because, you know, of the desire to do very  
13 targeted custodian groupings, you know, I think all the parties  
14 have had great difficulty in assessing duplication.

15           And that was one reason our initial proposal was to, you  
16 know, simply apply this across custodians so that we could  
17 actually, you know, analyze that duplication.

18           **THE COURT:** Okay. All right. So I will issue an  
19 order that tries to set some of this -- tries to record sort of  
20 what we have decided, at least the deadlines.

21           If you get it and it makes no sense or you come up with  
22 something else better in the meantime, just submit a stip. I'm  
23 just trying to help you. You guys know much more than I do  
24 about what you are doing. So don't hesitate to submit a  
25 different stip if it works better -- it works better for you.

1 And then our next gathering -- I'm actually going to be in  
2 virtual trial, bench trial, starting the 19th. So maybe -- it  
3 should be the 30th. I think I will probably be done by then.  
4 Again at 8:30.

5 **MR. MONTGOMERY:** Your Honor, speaking of your orders  
6 and setting deadlines, the last discovery order that you issued  
7 had a briefing schedule for us. And it's -- it had Plaintiff  
8 reply on October 18th which is actually a Sunday.

9 **THE COURT:** Okay.

10 **MR. MONTGOMERY:** Can we just clarify that we can file  
11 it the next day, on a Monday?

12 **THE COURT:** Of course. That was an error. You know  
13 me. I would never make you do that ever, ever.

14 **MR. MONTGOMERY:** I don't want to presume but I'm  
15 willing to concede.

16 **THE COURT:** Oh, no, for me you should presume that. I  
17 would never do that. That would be awful.

18 Okay. All right. I will do my best with that order.  
19 But, again, feel free to modify it as appropriate.

20 **MS. STEIN:** Thank you, Your Honor.

21 **MS. WEAVER:** Thank you very much, Your Honor.

22 **MS. KUTSCHER CLARK:** Thank you, Your Honor.

23 **MR. LOESER:** Thank you.

24 (Proceedings adjourned at 9:16 a.m.)  
25

CERTIFICATE OF REPORTER

We certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Saturday, September 26, 2020

A handwritten signature in blue ink that reads "Marla Knox". The signature is written in a cursive style and is positioned above a horizontal line.

Marla F. Knox, RPR, CRR, RMR  
U.S. Court Reporter